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Best Interests: The Courts' Polar Star Illuminates Foster Parent Concerns

State action to terminate parental rights boldly encroaches on the usually sacred domain of the parent-child relationship and represents perhaps the most drastic intrusion into this relationship supported by law.¹ States do not, however, interfere lightly with the constitutionally protected rights of parents to raise their own children.² Only when parents abuse or neglect their children does the state's interest in protecting the child become more compelling than that of preserving family autonomy.³

When circumstances of abuse or neglect are reported to a department of social services (DSS), the DSS investigates the report and, if necessary, removes the child from the home.⁴ Following removal, the child is often placed in the care of foster parents.⁵ Although placement in a foster home is a popular method of care for the child until a court can reach a final disposition, such placement creates yet another set of interests worthy of protection—those of the foster parents. In implementing the termination of parental rights statute, North Carolina law relies on the best interests of the child to resolve not only the conflict between the rights of the child and those of the natural parents, but also any conflict that may arise between the rights of the natural parents and those of the foster parents.⁶

1. "An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship . . ." N.C. GEN. STAT. § 7A-289.33 (1986); see Bell, *Termination of Parental Rights: Recent Judicial and Legislative Trends*, 30 EMORY L.J. 1065, 1068 n.12 (1981) (examining termination statutes nationwide and concluding there has been an increase in the protection of parental rights resulting from more specific standards for termination); see also *In re Gibson*, 4 Wash. App. 372, 379, 483 P.2d 131, 135 (referring to termination as an infringement on rights "more precious to many people than the right of life itself"), *cert. denied*, 79 Wash. 2d 1003 (1971).

2. See generally *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (recognizing constitutional protection of family relationships because of their important role in our history and tradition as a nation); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (Justice McReynolds describes "liberty" of fourteenth amendment due process as including the right to establish a home and bring up children).

3. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981) (state has "urgent interest in the welfare of the child"); see GOVERNOR'S ADVOCACY COUNCIL ON CHILDREN & YOUTH, N.C. DEPT. OF ADMIN., ACTING ON BEHALF OF ENDANGERED CHILDREN 2 (1973) (providing standards for intervention in families, removal of children from their homes, and termination of parental rights).

4. See N.C. GEN. STAT. § 7A-544 (1986).

5. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 631 (1976). Professor Wald proposes more restrictive standards of intervention by rejecting the current "best interests" standard and favoring one which would only permit removal when the child cannot be protected in the home from serious harm.

6. See N.C. GEN. STAT. § 7A-289.31 (Supp. 1985). The statute provides in part:

(a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child *unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.*

Id. (emphasis added).

The recent case of *In re Scarce*⁷ offered the North Carolina Court of Appeals an opportunity to uphold the "best interests" requirement of the termination statute in light of recent case law and, consequently, the opportunity to increase foster parents' influence in such proceedings. The appellate court concluded that the trial court appropriately exercised its discretion in allowing the foster parents to intervene in a termination of parental rights proceeding though such a permissive intervention was unprecedented.⁸ The court of appeals based its decision on the DSS' failure to show any abuse of discretion by the trial court and emphasized that the focus of that discretion should be the best interests of the child.⁹ This Note will examine the historical development of the termination statute relied on in *Scarce* and the practical implications of the *Scarce* decision for the future use of the statute.

On November 19, 1983, Dawn Scarce gave birth to a boy in Durham, North Carolina.¹⁰ She released the baby to the Durham County DSS two days later, and the DSS placed the child in the home of Barbara and Kelly Whitman, licensed foster parents.¹¹ On February 17, 1984, the DSS filed a petition asking the district court to take jurisdiction over the matter to terminate the parental rights of the then unknown biological father.¹² The infant was appointed a guardian ad litem that same day.¹³ The father was eventually identified as Jeffrey Harmon and on May 1, 1984, he filed a motion asking the trial court to give

7. 81 N.C. App. 531, 345 S.E.2d 404, *disc. rev. denied*, 318 N.C. 415, 349 S.E.2d 589 (1986).

8. *Id.* at 541, 345 S.E.2d at 410-11.

9. *Id.*

10. *Id.* at 533, 345 S.E.2d at 405.

11. *Id.* at 533, 345 S.E.2d at 405-06. Prior to signing the release, the mother expressed her concern to DSS officials that neither the biological father of the child nor his parents should be granted custody of the infant because she did not feel they were fit and proper individuals to have custody of the child. *Id.* at 533, 345 S.E.2d at 405.

12. *Id.* at 533, 345 S.E.2d at 406; *see* N.C. GEN. STAT. § 7A-289.24 (1986). The statute lists seven categories of persons who may file a petition to terminate parental rights:

- (1) Either parent seeking termination of the right of the other parent; or
- (2) Any person who has been judicially appointed as the guardian of the person of the child; or
- (3) Any county department of social services or licensed child-placing agency to whom custody of the child has been given by a court of competent jurisdiction; or
- (4) Any county department of social services or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such a child, pursuant to G.S. 48-9(a)(1); or
- (5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition; or
- (6) Any guardian ad litem appointed to represent the minor child pursuant to G.S. 7A-586, who has not been relieved of this responsibility and who has served in this capacity for at least one continuous year; or
- (7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes when there has been a determination of abuse or neglect under Article 44 of Chapter 7A of the General Statutes.

Id. In addition, section 7A-289.23 provides:

The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition.

N.C. Gen. Stat. § 7A-289.23 (1986).

13. *Scarce*, 81 N.C. App. at 533, 345 S.E.2d at 406.

him exclusive care, custody, and control of the child.¹⁴ The guardian ad litem then filed a counter-petition asking the court to deny Harmon's motion for custody, alleging that Baby Boy Scarce was a dependent, neglected, and abandoned child.¹⁵ On July 19, the foster parents were allowed to intervene pursuant to Rule 24(b) of the North Carolina Rules of Civil Procedure.¹⁶ The same day intervention was permitted, the DSS filed a petition asking the court to award custody of the child to the biological father.¹⁷ The trial began on October 2, 1984, and on December 31 the court entered its order awarding legal custody of the infant to the foster parents, subject to Harmon's visitation rights.¹⁸

The court of appeals held that the record fully supported the trial court's decision allowing the foster parents to intervene.¹⁹ The court rejected the DSS contention that *Oxendine v. Department of Social Services*,²⁰ a case prohibiting foster parents from bringing an action seeking custody, was controlling.²¹ In *Oxendine* the natural parents had voluntarily released their parental rights and surrendered the child to the DSS for adoptive placement.²² Distinguishing the case, the court of appeals noted that *Oxendine* involved standing to bring an action for custody, while *Scarce* involved only permissive intervention.²³

The court of appeals bolstered the trial court's decision by emphasizing the foster parents' statutory right to participate in review proceedings concerning the placement and care of the foster child after termination of parental rights.²⁴

14. *Id.* at 533-34, 345 S.E.2d at 406. The trial court found the biological father was untruthful and found evidence indicating he planned to release the baby to his parents so that they could adopt him. *Id.* at 535, 345 S.E.2d at 407.

15. *Id.* at 534, 345 S.E.2d at 406. The guardian ad litem filed the allegations because she did not believe the biological father was fit to care for the child at that time and felt custody should remain in the foster parents while the biological father was given an opportunity to improve his situation and establish his fitness. Telephone interview with Joanne Foil, guardian ad litem for Baby Boy Scarce (Oct. 27, 1986). The motivation of the guardian ad litem reflects the general notion that upon removal the natural parents should be given an opportunity to rehabilitate and improve their situations in an effort to have their child returned to the family home.

16. *Scarce*, 81 N.C. App. at 534, 345 S.E.2d at 406. Intervention is justified when "an applicant's claim or defense and the main action have a question of law or fact in common." N.C. GEN. STAT. § 1A-1, Rule 24(b)(2) (1983). The court considers whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties in exercising its discretion. *Id.*

17. *Scarce*, 81 N.C. App. at 534, 345 S.E.2d at 406. According to the Durham Department of Social Services, the general philosophy of the DSS is that natural families should be given an opportunity to provide a home for the child. The preferred option is to place a child with both biological parents. If the mother is not able to care for the child, however, the first alternative is to give the biological father an opportunity to prove himself a fit parent. Telephone interview with Daniel Hudgins, Director of the Durham County Department of Social Services (Mar. 25, 1987).

18. *Scarce*, 81 N.C. App. at 534, 345 S.E.2d at 406.

19. *Id.* at 541, 345 S.E.2d at 410.

20. 303 N.C. 699, 281 S.E.2d 370 (1981), see *infra* notes 80-86 and accompanying text.

21. *Scarce*, 81 N.C. App. at 540-41, 345 S.E.2d at 410.

22. *Oxendine*, 303 N.C. at 706, 281 S.E.2d at 375.

23. *Scarce*, 81 N.C. App. at 541, 345 S.E.2d at 410. "An intervenor by permission need not show a direct personal or pecuniary interest in the subject of the litigation." *Id.*

24. *Id.*; see N.C. GEN. STAT. § 7A-659 (1986). The statute states in part:

(a) The purpose of each placement review is to insure that every reasonable effort is being made to provide for a permanent placement plan for the child who has been placed in the custody of a county director or licensed child-placing agency, which is consistent with the child's best interest. At each review hearing the court may consider information from the Department of Social Services, the licensed child-placing agency, the guardian ad litem, the

The court further noted that the right of the foster parents to be heard, as recognized in *Smith v. Organization of Foster Families*,²⁵ derives from the child's right to have his or her best interests protected.²⁶ Finally, the court cited a Missouri court's reasoning that foster parents' right to intervene by permission is necessary to elicit "full and accurate information pertaining to the welfare of the child."²⁷ Based on this line of reasoning and the broad dispositional powers held by the trial court in termination cases, the court of appeals upheld the original *Searce* result.²⁸

To understand *Searce*, it is necessary to examine the development of the proceeding to terminate parental rights since its statutory inception in 1969, as it has undergone constitutional challenges, and as it has achieved a secure position under recent case law. The interest of the state in protecting children from a harmful environment is rooted in the doctrine of *parens patriae*, literally "parent of the country," which refers traditionally to the role of the state as guardian of persons under legal disability.²⁹ The doctrine was incorporated into the common law of this country³⁰ and became part of North Carolina statutory law in 1919 when the juvenile statutory law court was established, making the clerk of superior court the juvenile judge in each county.³¹ By the late 1960s, this statutory scheme became, as one commentator noted, "obsolete and inadequate in light of court-improvement legislation that put juvenile jurisdiction in the district court."³² In 1969, these laws were rewritten under a new title, "Juvenile Services," and a new section was added that expanded the grounds for termination of parental rights.³³ The new termination statute was just one portion of an overall effort to revise and clarify the jurisdiction and procedures applicable to

child, the foster parent, and any other person or agency the court determines is likely to aid in the review.

Id.

25. 431 U.S. 816 (1977).

26. *Id.* at 841-42 n.44.

We believe it would be most imprudent to leave entirely to court-appointed counsel the choices that neither the named foster children nor the class they represent are capable of making for themselves, especially in litigation in which all parties have sufficient attributes of guardianship that their views on the rights of the children should at least be heard.

Id.

27. *In re K.L.G.*, 639 S.W.2d 619, 622 (Mo. Ct. App. 1982).

28. *Searce*, 81 N.C. App. at 542, 345 S.E.2d at 411. "Having acquired subject matter jurisdiction, the court, guided by the best interests of the child, had broad dispositional powers, including the power to award legal custody of the child to the foster parents." *Id.*

29. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979); see also *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (state's goal, as *parens patriae*, is to provide children with permanent homes); Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293 (1972) (tracing *parens patriae* back to the English Court of Chancery).

30. Singleman, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1057-58 (1975).

31. Act of March, 1919, ch. 97, §§ 1-2, 1919 N.C. Pub. Laws 243, 243, (codified as amended, N.C. GEN. STAT. § 7A-289.32 (1986)); see also Thomas, *Social Services*, 36 POPULAR GOV'T 78, 83 (1969) (reviewing new juvenile court legislation).

32. Thomas, *supra* note 31, at 83.

33. Act of June 19, 1969, ch. 911, § 1, 1969 N.C. Sess. Laws 1047 (codified at N.C. GEN. STAT. § 7A-289.32 (1986)).

children in the district court.³⁴

The early United States Supreme Court cases dealing with termination of parental rights recognized the important liberty interest at stake. The Court in *Stanley v. Illinois*,³⁵ in response to a due process challenge by the father, held that he was entitled to a hearing on his fitness as a parent before rights to his illegitimate children could be terminated.³⁶ The Supreme Court's deference to the liberty interest of individuals resurfaced in *Addington v. Texas*,³⁷ in which the Court found that due process required that a "clear and convincing" standard of proof be employed when the interest was particularly important and more substantial than an economic interest.³⁸ Although the *Addington* Court did not specifically refer to parental rights, it is well established that parental rights are of fundamental importance.³⁹ "In 1979, the North Carolina Legislature amended [the termination statute] to require, consistent with *Stanley* and *Addington*, that '[a]ll findings of fact be based on clear, cogent and convincing evidence.'"⁴⁰ The Supreme Court's deference to parental interests gained a permanent foothold in *Santosky v. Kramer*,⁴¹ in which the Court unequivocally required the use of the "clear and convincing" standard of proof in all proceedings to terminate parental rights.⁴²

Santosky served as the catalyst for a further due process challenge. The North Carolina Supreme Court in *In re Montgomery*⁴³ held that the court of appeals had misconstrued *Santosky* to require a separate and distinct finding regarding the "intangible aspect of providing for the emotional and psychological needs of the child" before parents' rights could be terminated for neglect.⁴⁴

34. Thomas, *supra* note 31, at 82-84.

35. 405 U.S. 645 (1972).

36. *Id.* at 658. The Supreme Court in *Stanley* struck down an Illinois statute under which children of unwed parents, upon the death of the mother, were automatically declared wards of the state, without any examination of the father's parental fitness or proof of neglect. "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.* at 651.

37. 441 U.S. 418 (1979).

38. *Id.* at 432-33. Appellant's mother in *Addington* brought a civil action to have her son committed to a state mental institution. Appellant challenged the trial court's use of a "clear, unequivocal, and convincing" standard of proof, urging that a "beyond a reasonable doubt" standard be used instead. In describing the "clear and convincing standard" the Court stated:

Having concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable-doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state.

Id. at 431.

39. See *supra* note 2 and accompanying text.

40. *In re Montgomery*, 62 N.C. App. 343, 347, 303 S.E.2d 324, 326 (1983) (quoting N.C. GEN. STAT. § 7A-289.30(e) (1986)) (brackets in original), *rev'd*, 311 N.C. 101, 316 S.E.2d 246 (1984).

41. 455 U.S. 745 (1982).

42. *Id.* at 768-70. The Supreme Court held a clear and convincing evidence standard adequately conveys to the fact-finder the level of subjective certainty about his or her factual conclusions necessary to satisfy due process. *Id.*

43. 311 N.C. 101, 106, 316 S.E.2d 246, 250 (1984).

44. *Id.* at 108, 316 S.E.2d at 251.

Both *Stanly* [sic] and *Santosky*, as the Court of Appeals correctly noted, confine their considerations to procedural due process matters. However, the Court of Appeals interpreted *Santosky* as requiring a petitioner to establish that a child's intangible, non-economic needs

The supreme court reversed this erroneous expansion of the specific due process requirements, stating that "the Termination of Parental Rights statute as drafted provides an appropriate forum to address the 'intangible needs' issue, as well as protects a parent's interest in preserving the family."⁴⁵ The requirements of clear, cogent, and convincing evidence, combined with the courts' discretionary pursuit of the child's best interests, serve as the bulwark of the statute today.

A new constitutional challenge to the North Carolina termination statute surfaced in the 1981 case of *In re Biggers*.⁴⁶ Respondent contended that the statute was both unconstitutionally vague and a violation of the equal protection clause of the fourteenth amendment of the United States Constitution.⁴⁷ The arguments focused on two of the statutory grounds for termination:

The court may terminate the parental rights upon a finding of one or more of the following:

....

(2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 110-117(1)(a), (b), or (c), or a neglected child within the meaning of G.S. 7A-278(4).

....

(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.⁴⁸

The court applied the principles of the vagueness doctrine⁴⁹ to the terms

were not being fulfilled by his or her parents before said parents' parental rights could be terminated.

Id. at 106, 316 S.E.2d at 250.

45. *Id.* at 108, 316 S.E.2d at 251.

46. 50 N.C. App. 332, 274 S.E.2d 236 (1981).

47. *Id.* at 338-41, 274 S.E.2d at 240-41.

48. N.C. GEN. STAT. § 7A-289.32 (Supp. 1981) (amended 1983). Subsections (2) and (4) of section 7A-289.32 now read:

(2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 7A-517(1), or a neglected child within the meaning of G.S. 7A-517(21).

....

(4) The child has been placed in the custody of a county Department of Social Services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition, has willfully failed for such period to pay a reasonable portion of the cost of care for the child although physically and financially able to do so.

N.C. Gen. Stat. § 7A-289.32(1986) section 7A-517(21) (formerly N.C. GEN. STAT. § 7A-278(4)) states that a neglected child is one who

does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7A-517(21) (1986).

49. The *Biggers* court used principles of the vagueness doctrine enunciated by the Supreme Court in *United States v. Petrillo*, 332 U.S. 1 (1947):

"abuse" and "neglect," and concluded the legislature had given these terms a precise and understandable meaning by the normative standards imposed on parents by society.⁵⁰ The court held that the statutory language provides boundaries sufficiently distinct for uniform administration, yet sufficiently flexible for application to a variety of circumstances.⁵¹

The equal protection argument raised in *Biggers* focused on subsection four of the statute, which premises termination of parental rights on the failure of a parent to pay reasonable costs of care. "The basis for an equal protection claim against this subsection would be that it discriminates against parents, according to their financial circumstances, by authorizing termination of their rights for the economic failure to pay for their child's foster care costs."⁵² The court rejected this argument, however, holding that subsection four fulfills equal protection requirements by applying the reasonable portion standard to all parents, irrespective of their wealth or poverty, and by making their ability to pay the controlling characteristic of what is deemed a reasonable amount for them to pay.⁵³

After *Biggers*, the constitutionality of the termination statute was settled. Further disputes, however, arose in interpretation of the statute. Plaintiff in *In re Ballard*⁵⁴ raised a subtle yet fundamental challenge to the interpretation of "neglect," which is one of the grounds for termination of parental rights.⁵⁵ Neglect is the most pervasive criterion in the specified grounds for termination and plaintiff in *Ballard* questioned the time frame used in determining neglect.⁵⁶ The North Carolina Supreme Court drew a distinction between neglect at the time the child is first removed from the home and neglect at the time of the

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.

Biggers, 50 N.C. App. at 340, 274 S.E.2d at 241.

50. *Id.* at 341, 274 S.E.2d at 241.

51. *Id.* at 342-43, 274 S.E.2d at 242; see also *In re Clark*, 303 N.C. 592, 605-06, 281 S.E.2d 47, 56 (1981) (upholding *Biggers* rationale finding the trial court had erred in dismissing the proceeding on the ground that subsection (4) of § 7A-289.32 is unconstitutionally vague).

52. *Biggers*, 50 N.C. App. at 339, 274 S.E.2d at 240.

53. *Id.* at 339, 274 S.E.2d at 240.

54. 311 N.C. 708, 319 S.E.2d 227 (1984).

55. *Id.* Justice Carlton's dissenting opinion in *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed*, 459 U.S. 1139 (1983), clearly foreshadowed the conclusion eventually reached in *Ballard*:

I believe that the plain language of the statute compels the conclusion that when neglect is to be used as a statutory ground for terminating parental rights, the court trying the termination matter must find that neglect on the basis of the parent's conduct just prior to the filing of the petition to terminate.

Id. at 408, 293 S.E.2d at 135 (Carlton, J., dissenting). Justice Carlton distinguished the initial removal of the child, designed to give the parent the opportunity to improve conditions in the home, from the subsequent termination proceeding designed to eliminate the parent's rights forever. *Id.* (Carlton, J., dissenting).

56. See *supra* note 48 for the statutory definition of neglect.

termination hearing.⁵⁷ The *Ballard* court admitted evidence of past neglect, but rejected the notion that such evidence was the sole criterion necessary to establish neglect as a ground for termination.⁵⁸ Because the trial court used evidence of past neglect to justify termination of parental rights, but failed to determine whether such neglect existed at the time of the termination hearing, the supreme court reversed the lower court decision.⁵⁹ "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination hearing."⁶⁰

This distinction between finding neglect when the child is first removed, and finding neglect at the time of the termination proceeding is magnified when one considers the different goals of the two proceedings. Judge Becton emphasized and assessed the distinction in his dissenting opinion in *In re Webb*.⁶¹ Becton stated that "the invasion of the interest of family autonomy—indeed, privacy—is much more significant in termination proceedings than in temporary removal proceedings."⁶² He continued, "[T]he State even has the power to shape the historical events that form the basis for ['bonding' and, therefore] termination."⁶³ Becton asserted that the intrusion of removal reaches Orwellian proportions when it is compounded with state control of the child in the interim between removal and termination.⁶⁴ He reiterated the Supreme Court's concern in *Santosky* about the disparity between the State's ability to assemble its case and the parents' ability to mount a defense, and specifically attacked the court's use of the neglect standard as aggravating that disparity.⁶⁵ Use of prior

57. *Ballard*, 311 N.C. at 714, 319 S.E.2d at 232.

58. *Id.*

59. *Id.* at 715, 319 S.E.2d at 232.

60. *Id.* (emphasis added). The *Ballard* rationale was followed in *In re Manus*, 82 N.C. App. 340, 346 S.E.2d 289 (1986). The trial court in *Manus* based its conclusion of neglect on its findings relative to past conditions and made no determination resolving the conflicts in the evidence as to whether conditions existing at the time of the hearing were indicative of a probability of continued neglect or whether the previous neglect had ameliorated. For that reason the court of appeals held that the trial court found insufficient facts to support its termination order. *Id.* at 349, 346 S.E.2d at 295.

61. 70 N.C. App. 345, 353-54, 320 S.E.2d 306, 310-11 (1984) (Becton, J., dissenting), *aff'd*, 313 N.C. 322, 327 S.E.2d 879 (1985).

62. *Id.* at 353, 320 S.E.2d at 311 (Becton, J., dissenting).

63. *Id.* at 359, 320 S.E.2d at 314 (Becton, J., dissenting) (quoting *Santosky*, 455 U.S. at 763) (brackets in original). The phenomenon of bonding has clear implications for foster parents' physical control of the child.

Where the adult in charge of the child is personally and emotionally involved, a psychological interplay between adult and child will be superimposed on the events of bodily care. Then the child's libidinal interest will be drawn for the first time to the human object in the outside world.

Such primitive and tenuous first attachments form the base from which any further relationships develop.

J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 18 (1973).

64. *Webb*, 70 N.C. App. at 358, 320 S.E.2d at 314 (Becton, J., dissenting).

65. *Id.* at 359, 320 S.E.2d at 314 (Becton, J., dissenting). In *Santosky* the Supreme Court described the disparity:

No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychol-

neglect as a determinative factor, combined with interim state control and the consequent likelihood of bonding between the child and foster parent, substantially thwarts the Supreme Court's attempts to protect the interests of natural parents in preserving family autonomy.⁶⁶

As illustrated in these cases, state control of the child in the interim period between temporary removal and potential termination poses dramatic challenges to courts trying to implement the termination statute within the parameters of due process. Foster parents' physical control of the child during this interim period complicates the due process formula even further. A number of states, including North Carolina, specifically recognize the right of a foster parent to petition to terminate the parental rights of parents to their minor child if the child has resided with the foster parents "for a continuous period of two years or more next preceding the filing of the petition."⁶⁷ Although the foster parents' right to initiate a termination proceeding is well established, the standing of the foster parent to intervene in a termination proceeding initiated by the state remains unsettled.

Few courts have addressed specifically whether foster parents may intervene in a termination of parental rights proceeding initiated by the State. In *Mendez v. Brewer*⁶⁸ the Texas Supreme Court held that foster parents lacked standing to intervene in a termination proceeding brought by the State's Department of Human Resources.⁶⁹ The court reasoned that "the only relationship the [foster parents] had with [the child] was as agent for the Department under the written contract to provide the foster home care for [the child]."⁷⁰ In *Division of Youth & Family Services v. D.T. & J.T.*,⁷¹ however, the New Jersey Superior Court held that foster parents could intervene and present testimony in an action brought by the New Jersey Division of Youth and Family Services to terminate the rights of the natural parents, based on the foster parents' ability to provide helpful information in determining what is in the best interests of the children.⁷² The court noted a trend recognizing foster parent standing in court on matters affecting their foster children.⁷³

ogy, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

Santosky, 455 U.S. at 763.

66. *Webb*, 70 N.C. App. at 359, 320 S.E.2d at 314 (Becton, J., dissenting).

67. N.C. GEN. STAT. § 7A-289.24(5) (1986); see also 50 N.C. Att'y Gen. Rep. 1, 1 (1980) ("Although no cases construe this statute, patently it confers standing upon any person, including a foster parent, with whom the child has lived continuously during the preceding two years.").

68. 626 S.W.2d 498 (Tex. 1982) (court found sole interest of foster parents in petition to intervene was their wish to adopt the child and this made their interest wholly contingent on a judgment of termination).

69. *Id.* at 500.

70. *Id.* at 499.

71. 171 N.J. Super. 520, 410 A.2d 79 (Juv. & Dom. Rel. Ct. 1979).

72. *Id.* at 526, 410 A.2d at 82.

73. *Id.* The court cited the recent case of *Doe v. State*, 165 N.J. Super. 392, 398 A.2d 562 (App. Div. 1979) (foster parents have a right to be heard if they object to an administrative determi-

New York state courts use a hybrid approach to the issue of standing. Foster parents cannot intervene as a matter of right at the fact-finding hearing in a permanent neglect proceeding because it is not considered a "custody proceeding."⁷⁴ Foster parents have an absolute right, however, to intervene in a dispositional hearing when "[i]t is indisputable that the custody and control of the child are at issue."⁷⁵ Like the New Jersey courts, the New York courts have recognized a trend toward granting foster parents a voice in decisions affecting their charges.⁷⁶

Because no previous North Carolina decisions have addressed directly the issue of foster parent intervention in a termination proceeding brought by the State, foster parents' status in other custody situations provides the only indication of how North Carolina courts will treat foster parent concerns. In *Browne v. Department of Social Services*,⁷⁷ the North Carolina Court of Appeals held that foster parents had no standing to bring a habeas corpus action to have the court determine temporary or permanent custody of the children in question.⁷⁸ The court based its decision on the wording of the statute at that time, which gave exclusive control of placement plans to the Department of Social Services.⁷⁹

Six years after *Browne*, the court of appeals in *Oxendine* suggested that in some circumstances foster parents might be able to initiate adoption proceedings against the wishes of the DSS. In *Oxendine* the foster parents had requested the consent of the Department of Social Services to adopt the child, but the DSS denied the request because the foster parents were of advanced age and because they resided in the same county as the natural parents.⁸⁰ The court stated that

nation by the Department of Youth and Family Services to remove a foster child from their home). *D.T. & J.T.*, 171 N.J. Super. at 526, 410 A.2d at 82; see also *In re Adoption of Two Children*, 170 N.J. Super 320, 406 A.2d 468 (App. Div. 1979) (foster parents have standing to file a petition with the court to determine whether the rights of the natural parents should be terminated based on changed circumstances).

74. *In re Laura Ann*, 82 Misc. 2d 776, 778, 371 N.Y.S.2d 591, 594 (Fam. Ct. 1975). The court distinguished the fact-finding and dispositional hearings by noting that the purpose of the fact-finding hearing is only to determine whether the allegations in the petitions are sustained by a fair preponderance and the purpose of the dispositional hearing is to determine specifically in whose custody the child should be placed. *Id.* at 777-78, 371 N.Y.S.2d at 593-94. The more recent case of *In re Marina S.*, 111 Misc. 2d 898, 445 N.Y.S.2d 396 (Fam. Ct. 1981), clarified the distinction:

A distinction must be made here between the permission granted to intervene in the prior consolidated proceedings, all of which were essentially custodial in nature and the current fact finding proceeding. There, the best custodial interests of the child was the sole issue. Here, only the fitness of the parent is at issue in the fact finding hearing.

Id. at 901, 445 N.Y.S.2d at 398.

75. *Laura Ann*, 82 Misc. 2d at 779, 371 N.Y.S.2d at 594.

76. *Id.*; see also *In re Marina S.*, 111 Misc. 2d 898, 445 N.Y.S.2d 396 (Fam. Ct. 1981) (holding foster parents do not have standing at fact-finding stage of termination proceedings, but do have standing at the dispositional hearing); *In re J.*, 74 Misc. 2d 254, 343 N.Y.S.2d 679 (Fam. Ct. 1973) (a fact-finding hearing in a permanent neglect proceeding is not a custody proceeding).

77. 22 N.C. App. 476, 206 S.E.2d 792 (1974).

78. The children had been placed initially in DSS custody after an adjudication of neglect. They were then placed with foster parents, but upon termination of parental rights, they were removed from the foster home. *Id.* at 478, 206 S.E.2d at 793.

79. *Id.* at 478, 206 S.E.2d at 793. The court was relying on N. C. GEN. STAT. § 7A-288 (1969), repealed by Act of July 1, 1977, ch. 879, § 7, 1977 N.C. Sess. Laws 1201, 1202.

80. *Oxendine*, 49 N.C. App. at 572-73, 272 S.E.2d at 418-19.

the applicable statute, which specified that the agency with custody shall "acquire all of the rights for placement,"⁸¹ was essentially the same as the statute used to preclude foster parent action in *Browne*, which had stated that the agency "shall have the right to make such placement plans for the child as it finds to be in his best interest."⁸² Finding that these statutes were essentially identical in meaning, the *Oxendine* court precluded foster parent action just as the *Browne* court had done.⁸³ The North Carolina Supreme Court denied that the statute used by the court of appeals in *Oxendine* was controlling, but nonetheless affirmed the decision on the basis of section 48-9.1, stating, "There is nothing in the language of the statute which gives foster parents standing to contest the DSS exercise of its rights as legal custodian."⁸⁴ The *Oxendine* court went on to say, however, that "the courts shall have the authority to determine whether the department's failure to grant a petition for adoption was unreasonable and unjust."⁸⁵ "If a court determines that consent was unreasonably withheld to the detriment of the welfare of the child, plaintiffs [foster parents] may initiate proceedings to adopt the child as if DSS consent had been given."⁸⁶

Despite the denial of the foster parents' standing to seek custody in that particular case, the latter portion of the *Oxendine* decision represents an attempt to balance due process rights of the foster parents with those of the natural parents as the court endeavors to determine the best interests of the child. Indeed, the focal point in all termination cases must be the best interests of the child.⁸⁷ The pursuit of those interests often serves as a justification for the trend illustrated above in the New York and New Jersey cases, which recognized foster parents' rights with respect to their foster children.⁸⁸ The North Carolina Supreme Court in *In re Shue*⁸⁹ expressed a similar opinion, stating, "whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of the child must be heard and considered by the trial court . . ."⁹⁰ Moreover, in *Smith v. Organization of Foster Families*,⁹¹ the United States Supreme Court held that foster parents who attack state procedures have standing to assert, under the fourteenth

81. *Id.* at 577, 272 S.E.2d at 421. The court was relying on N.C. GEN. STAT. § 7A-289.33 (1977), repealed by Act of June 7, 1979, ch. 815, § 1, 1979 N.C. Sess. Laws 966, 966.

82. *Browne*, 22 N.C. App. at 478, 206 S.E.2d at 793. The court was relying on N.C. GEN. STAT. § 7A-288 (1969), repealed by Act of July 1, 1977, ch. 879, § 7, 1977 N.C. Sess. Laws 1201, 1202.

83. *Oxendine*, 303 N.C. at 708, 281 S.E.2d at 376.

84. *Id.* at 707, 281 S.E.2d at 375. Section 48-9.1(1) states that legal custody is in DSS if the child is surrendered and consent has been given to DSS. N.C. GEN. STAT. § 48-9.1(1) (1984).

85. *Oxendine*, 303 N.C. at 708, 281 S.E.2d at 376.

86. *Id.* at 709, 281 S.E.2d at 376.

87. N.C. GEN. STAT. § 7A-289.22(3) (1986); see, e.g., *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984) (describing the best interests of the child as the "polar star").

88. See *supra* text accompanying notes 71, 76. A New York court concluded that foster parents have a right to be heard, which derives from the protection of the child's best interests. *Goldstein v. Lavine*, 100 Misc. 2d 126, 133, 418 N.Y.S.2d 845, 851 (1979).

89. 311 N.C. 586, 319 S.E.2d 567 (1984).

90. *Id.* at 597, 319 S.E.2d at 574.

91. 431 U.S. 816 (1977).

amendment, liberty rights in their preserving their family unit.⁹² The best interests of the child thus may sway the North Carolina courts to exercise their discretion in favor of improving foster parent status in termination cases.

The proceeding to terminate parental rights, although a drastic limitation of a fundamental interest, has nonetheless withstood numerous constitutional challenges. Although North Carolina courts now require a termination order to be based on "clear, cogent, and convincing" evidence, the basic premise of the statute remains intact; the best interests of the child continue to be the pivotal factor in resolving all termination cases. Because the best interests of the child must prevail over the interests of natural parents or foster parents, the adult interests that correspond more closely with the court's determination of the child's best interests will likely prevail. Court discretion obviously plays a strategic role when an inherently subjective criterion like "best interests" must be determined. The *Scarce* litigation illustrates this point and implies that to make an intelligent and informed determination of the child's best interests, courts may be inclined to permit foster parent intervention rather than risk ignorance about relevant evidence of the child's life.⁹³

Scarce initially adhered to the typical scheme of a termination of parental rights proceeding and incorporated its most potent elements. The DSS instituted an action to terminate, the court appointed a guardian ad litem for the child, and the guardian alleged neglect and abandonment by the biological father.⁹⁴ Only when the foster parents intervened with the court's permission, and the DSS changed camps to support the biological father whose parental rights they had intended to sever, did the case take on a dramatically different agenda.

Despite the drastic turn of events after intervention, the *Scarce* case as a whole incorporates many of the elements of its more typical predecessors. First, Judge Cozort used the clear, cogent, and convincing standard, adopted by the North Carolina General Assembly in response to *Stanley* and *Addington*,⁹⁵ to hold that the district court's findings of fact were properly supported by the evidence.⁹⁶ Second, the *Scarce* court evaluated the evidence of neglect and abandonment as specified by the criteria enumerated in the termination statute and upheld as constitutional in *Biggers* and *Montgomery*. Specifically, the court described the father's neglect in terms of sporadic support payments, missed visits with the infant, and a general failure "to show any interest whatsoever in said child's health and welfare."⁹⁷ This description directly parallels the language of the statute.⁹⁸ Although the *Scarce* decision did not culminate in an actual termination of parental rights, it did rely on those elements of the statute held constitutional in *Biggers* and *Montgomery*.⁹⁹

92. *Id.* at 842 & n.45.

93. *Scarce*, 81 N.C. App. at 541, 345 S.E.2d at 410.

94. *Id.* at 533-34, 345 S.E.2d at 406.

95. See *supra* notes 35-40 and accompanying text.

96. *Scarce*, 81 N.C. App. at 532, 345 S.E.2d at 405.

97. *Id.* at 536, 345 S.E.2d at 407.

98. See *supra* note 48 for the text of the statute.

99. *Scarce*, 81 N.C. App. at 535-36, 345 S.E.2d at 407.

Scarce is significant primarily in that it allows foster parent intervention in a state-initiated proceeding to terminate parental rights, despite the prior tendency of North Carolina courts to support the DSS in custody-type proceedings in which the rights of foster parents conflict with the wishes of the department.¹⁰⁰ The statute governing the effects of surrender and consent given to the DSS states that legal custody will be in the DSS unless otherwise ordered by the court.¹⁰¹ In *Oxendine* the court focused on the portion of this statute giving the DSS legal custody.¹⁰² The *Scarce* court focused instead on the portion of the statute allowing the court to order otherwise and took full advantage of its broad dispositional powers.¹⁰³ The court distinguished *Oxendine* as a case in which foster parents sought to bring an action for custody, rather than to intervene permissively. The disparate treatment of the foster parents in these two situations, however, may also be explained by the court's ultimate goal—the best interests of the child. The *Scarce* court used its discretion to allow foster parent intervention because it was convinced the best interests of the child would be served by such intervention.¹⁰⁴

Trial court discretion and the best interests of the child do not provide a particularly precise explanation for the *Scarce* decision, however, and the termination statute itself provides little to support the specific conclusion the court reached. One portion of the statute clearly recognizes the right of a foster parent to petition for termination of parental rights, but only if the foster child has lived in the foster home for more than two years.¹⁰⁵ The foster child in *Scarce* had lived only three months with the foster parents when the DSS brought the action, and only eight months when the foster parents were permitted to intervene.¹⁰⁶ Clearly, the foster parents in *Scarce* could not have petitioned for termination of parental rights in accordance with the statute. Intervention thus achieved a result the foster parents could not have realized by direct action. Furthermore, even if a statute did permit foster parents to petition for termination of parental rights, a court could nevertheless deny foster parent intervention in a proceeding initiated by a state agency.¹⁰⁷ The *Scarce* court tried to support its position by analogy to the more peripheral portions of the statute.¹⁰⁸ One such portion recognized the right of the foster parents to participate in review

100. See *supra* text accompanying notes 77-86.

101. N.C. GEN. STAT. § 48-9.1 (1984).

102. *Oxendine*, 303 N.C. at 707, 281 S.E.2d at 375.

103. *Scarce*, 81 N.C. App. at 542, 345 S.E.2d at 411.

104. *Id.* at 542-43, 345 S.E.2d at 411.

105. Section 7A-289.24 states in part that "[a] petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by: . . . [a]ny person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition. . . ." N.C. Gen. Stat. § 7A-289.24 (1986).

106. *Scarce*, 81 N.C. App. at 533-34, 345 S.E.2d at 405-06.

107. The Texas Court of Civil Appeals, in *Harris County Child Welfare Unit v. Caloudas*, 590 S.W.2d 596, 599 (Tex. Civ. App. 1979), found that foster parents had standing to petition for termination of the rights of the natural parents when the child had been in their care for two years, based on a state statute. In *Mendez v. Brewer*, 626 S.W.2d 498, 500 (Tex. 1982), however, the Texas Supreme Court refused to allow foster parents to intervene in a proceeding, brought by the Department of Human Resources, to terminate parental rights.

108. *Scarce*, 81 N.C. App. at 540-41, 345 S.E.2d at 409-11.

proceedings concerning the placement and care of the foster child after termination of parental rights.¹⁰⁹ This supports the notion that foster parents have a right to be heard once termination is completed, but *Searce* involved foster parent intervention prior to termination.¹¹⁰

The New York courts distinguish between the fact-finding and dispositional portions of a termination proceeding and allow foster parents to participate in the latter.¹¹¹ Because the father in *Searce* was unidentified at the time the mother surrendered the child, much factfinding was required in the *Searce* litigation,¹¹² which also culminated in a dispositional decision.¹¹³ Allowing the foster parents to intervene in such a proceeding may indicate a discretionary adoption in North Carolina of the trends noted in New York and New Jersey toward recognizing foster parents' rights in their charges.

Despite the difficulty in precisely identifying statutory support for the *Searce* court's conclusions, the decision has serious implications for future use of the statute. If permissive intervention by foster parents is routinely allowed prior to an order to terminate, the State's power to control the history of termination cases will likely be enhanced, and the disparity between the State's power to assemble its case and the natural parents' ability to mount a defense will be magnified. The *Ballard* requirement of finding neglect at the time of the termination proceeding may be practically emasculated as a safeguard of the rights of the natural parents when foster parents are allowed to intervene in termination proceedings. The attempts of natural parents to show that they have improved their situations enough to warrant a return of their child will face a powerful counterforce in the form of foster parent presence at the hearings.

Judge Becton, dissenting in *Webb*, provided a description of how strong a force foster care can be against natural parents' honest efforts to reform.

Given the tender ages of the children involved in most of these cases and the length of time it generally takes from temporary removal to termination, . . . bonding between the child and the foster parents is likely to occur and is, therefore, likely to be unduly weighted when balanced against the interest of parents who simply may have been careless, immature, and not mean at all. When the best interest of the child is weighed on the scales of justice, it is wrong to place the heavy thumb of bonding on the side of the foster parents, especially when the parents have not even been given the opportunity to apply admittedly learned parenting skills.¹¹⁴

The *Searce* decision is likely to make the "heavy thumb of bonding" at least as potent a force for natural parents to reckon with as their own previous neglectful behavior.

The only way to reconcile the fears expressed in *Ballard* and Judge Becton's

109. N.C. GEN. STAT. § 7A-659(a) (1986).

110. *Searce*, 81 N.C. App. at 534, 345 S.E.2d at 406.

111. See *supra* notes 74-75 and accompanying text.

112. *Searce*, 81 N.C. App. at 534-36, 345 S.E.2d at 406-07.

113. *Id.* at 543, 345 S.E.2d at 411.

114. *Webb*, 70 N.C. App. at 359, 320 S.E.2d at 314-15 (Becton, J., dissenting).

dissent in *Webb* with the court's decision in *Searce* is to rely once again on the elusive focal point in all these cases—the best interests of the child. “Although courts should balance the parents’ inherent right to maintain their family unit with the welfare of the minor child, it is the latter that should always prevail, if it is determined that the two interests are conflicting.”¹¹⁵ In the opinion of the *Searce* court, foster parent intervention provided evidence of the child's best interests, and thus could not be denied.¹¹⁶ Although the trial court concluded and the court of appeals agreed that intervention by the foster parents would not “prejudice the adjudication of the rights of the original parties,” the best interests rationale was the prevailing factor in the court's determination.¹¹⁷ *Searce* can best be characterized as a tool to define and shape the trial court's role in applying the best interests standard. By allowing the foster parents to intervene, the *Searce* court indicated that the court's exposure to all available information was essential to determine the best interests of the child.¹¹⁸ Although this is not a precise formulation of the best interests standard, it does indicate the court's willingness to adopt a more liberal approach in searching for the fulfillment of that standard. Because foster parents' physical control of the child is a significant facet of the child's life, it is only reasonable for courts to treat awareness of this facet as an important piece in the best interests puzzle the court is asked to solve.

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115. *Montgomery*, 311 N.C. at 116, 316 S.E.2d at 256. The goal of state intervention has traditionally been the best interests of the child, but implementation of this goal has proved problematic.

In giving meaning to [the best interests] goal, decisionmakers in law have recognized the necessity of protecting a child's physical well-being as a guide to placement. But they have been slow to understand and to acknowledge the necessity of safeguarding a child's psychological well-being. While they make the interests of a child paramount over all other claims when his physical well-being is in jeopardy, they subordinate, often intentionally, his psychological well-being to, for example, an adult's right to assert a biological tie. Yet both well-beings are equally important, and any sharp distinction between them is artificial.

J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 63, at 4.

116. *Searce*, 81 N.C. App. at 540-41, 345 S.E.2d at 410.

117. *Id.* The court admitted that the foster parents did not advocate the position of the father or DSS and concentrated instead on the best interests argument.

118. *Id.*